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Supreme Court, U. S.  
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DEC 23 1996  
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No. 96-653

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,  
by his next friend, MELISSA THOMAS,  
*Petitioners,*

v.

GENERAL MOTORS CORPORATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

**BRIEF FOR RESPONDENT IN OPPOSITION**

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26 pp

**QUESTION PRESENTED**

Whether the court below erred when, in remanding this case for a new trial on several other grounds, it also ruled that one witness would be precluded from testifying at the retrial because the Full Faith and Credit Clause would require the trial court to honor the binding terms of an injunction issued by another court in another proceeding.

## LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

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**On Petition for a Writ of Certiorari to the  
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**BRIEF FOR RESPONDENT IN OPPOSITION**

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Respondent General Motors Corporation submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.<sup>1</sup> This case does involve an important question of federal law under the Full Faith and Credit Clause that is of increasing significance to the administration of justice throughout the country. Nonetheless, because that important issue is not squarely presented by the ruling below, because this case was correctly decided, and because the case has been

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<sup>1</sup> By letter dated November 21, 1996, pursuant to S. Ct. R. 30.4, the Clerk of this Court granted General Motors an extension of time "to and including December 23, 1996" within which to file this response.

remanded for retrial on several grounds, it does not merit review at this time.

### COUNTERSTATEMENT OF THE CASE

1. This case involves tort claims that stem from an automobile accident. On February 23, 1990, Doris McElwain tried to pass a UPS truck on Highway 63 in Missouri, and her Trans-Am slammed head on into a Chevy S-10 Blazer driven by Gerald Shoemaker. After the collision, a fire started in the engine compartment of the Blazer. Beverly Garner, Mr. Shoemaker's front-seat passenger, was killed in the accident.

Ms. Garner's children -- Kenneth and Steven Baker -- brought this action, sounding in strict products liability, against General Motors, which manufactured the Blazer, in Missouri state court. The case was later removed to federal court. Plaintiffs claimed that the Blazer was defective in that its electric fuel pump allegedly continued to pump fuel to the engine after impact; that the fuel started the fire in the engine compartment; and that the fire, rather than the impact, caused Ms. Garner's death. General Motors vigorously denies that the fuel pump was faulty or that it caused the fire, and has defended on the ground that Ms. Garner died as a result of collision impact injuries. Plaintiffs sought compensatory damages for wrongful death as well as damages for "aggravating circumstances" (*i.e.*, punitive damages) under Missouri law.

2. The case was never tried on the merits. Rather, the District Court entered an extraordinary default sanction against General Motors for its alleged failure to locate, on a timely basis, certain documents that were, at best, tangentially relevant to the issues to be determined at the trial. The triple-barrel default sanction instruction took away from the jury: (i) whether the fuel pump in the Chevy Blazer was defective;

and (ii) whether that defect caused the post-accident fire. The instruction also (iii) effectively directed the jury to impose the equivalent of punitive damages on General Motors. The District Court entered this far-reaching sanctions order even though it never found that General Motors had violated the specific terms of its discovery orders, wilfully or otherwise, and despite the fact that General Motors had taken extraordinary steps to comply with a barrage of last-minute discovery requests by the plaintiffs, including the production of more than 20,000 documents in the four months leading up to the trial date -- without the plaintiffs filing even a single motion for an order compelling discovery.

With the pivotal issues of defect and causation thus predetermined, the abbreviated trial of the few remaining issues began shortly thereafter. Plaintiffs' witnesses testified that, although there were no signs of consciousness from anyone in the car after the collision, Ms. Garner would have lived but for the fire in the engine compartment. Plaintiffs also presented expert witnesses who testified that gasoline fueled the post-collision fire. General Motors' witnesses testified that Ms. Garner could not have been wearing her seatbelt and likely died from the impact of the collision. General Motors' witnesses also testified that an electrical malfunction could not have caused the fire, and that the fuel lines would not have been compromised in the impact.

During closing argument, plaintiffs' counsel relied on the District Court's instruction that "GM had been aware of that defect and hazard for many years," imposed as part of its default sanction, to urge the jury to award a large verdict that included substantial punitive damages. These efforts were aided by the jury instructions that the District Court gave about the imposition of "aggravating circumstances" or punitive damages under Missouri law, which the Court of Appeals ultimately found to be unconstitutional. So instructed, the jury returned a verdict against General Motors for \$11.3 million.

3. One of the plaintiffs' witnesses at the abbreviated trial was Ronald Elwell, a disgruntled former employee of General Motors. Elwell worked for many years as an integral member of the in-house litigation team whose primary function was to assist General Motors' lawyers in the defense of products liability litigation. As an in-house litigation consultant, Elwell was necessarily and regularly afforded access both to General Motors' proprietary information and to its privileged attorney-client communications and work product. In 1987, after numerous disagreements with his supervisors over his pay and lack of promotions, Elwell requested and obtained an early retirement package, which allowed him to seek outside employment as an expert litigation witness, provided that he did not breach his continuing fiduciary duties to General Motors.

In 1991, Elwell was deposed in a Georgia products liability case brought against General Motors. At about the same time, Elwell sued General Motors in Michigan state court, based on dissatisfaction with the terms of his severance package. When Elwell was deposed for a second time in the Georgia case, he gave testimony over General Motors' objection that wrongfully disclosed both the work product of General Motors' attorneys and privileged attorney-client information. Elwell also produced at the deposition five boxes of documents that he had misappropriated from General Motors, many of which contained privileged attorney-client communications, attorney work product and confidential trade secret information.

To prevent any further violations of its attorney-client and work-product privileges, General Motors counterclaimed in Elwell's Michigan lawsuit and sought to enjoin him from further divulging any of General Motors' privileged information. After a full adversary hearing in which both sides presented testimony and argument, the Michigan court granted a preliminary injunction prohibiting Elwell from disclosing to any person any of General Motors' trade secrets or confidential

information, or any matters protected by General Motors' attorney-client or work-product privileges. The Michigan court also found that Elwell posed an immediate and continuing danger to General Motors' legal privileges.

After the issuance of the preliminary injunction, General Motors and Elwell resolved the employment dispute and entered into a number of binding stipulations, including one in which Elwell acknowledged that his previous close working relationship with General Motors' legal staff and outside lawyers makes it extremely difficult for him to determine whether his knowledge with respect to General Motors comes from attorney-client and work-product communications or from nonprivileged sources. Based on this stipulation and the factual findings made at the earlier evidentiary hearing about Elwell's wrongful disclosures of privileged information, the Michigan court ordered permanent injunctive relief barring Elwell from testifying, by deposition or at trial, without General Motors' consent in any case that involves a General Motors product, other than the Georgia case in which he had already testified.

Disregarding the binding terms of the Michigan injunction, the plaintiffs in this case moved for an order permitting them to depose Elwell. General Motors opposed this motion, primarily on the ground that the District Court must honor the Michigan injunction under the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. IV, § 1, and its implementing legislation, 28 U.S.C. § 1738. The District Court, however, held that the Michigan injunction did not bar Elwell's testimony for two reasons: (1) it violates Missouri public policy embodied in the discovery rules followed by the state courts; and (2) it is subject to modification by a Michigan court and therefore is not binding on any other court (even though the issuing court in Michigan has denied motions by five separate parties — *including by Elwell himself* — to vacate or modify the injunction, and another Michigan court has denied a motion filed by a similar products-liability plaintiff that sought to

undermine the effects of this injunction).

4. The principal focus of this case in the Eighth Circuit Court of Appeals was the validity and consequences of the extraordinary sanction imposed on General Motors by the District Court. General Motors contended that the sanction was improper for a number of reasons, and in any event the dramatic breadth of the sanction could not be justified on these facts. The Court of Appeals ultimately agreed that the sanction was not justified on the facts of this case, and therefore reversed and remanded this case "for imposition of a lesser sanction and for a new trial." Pet. App. 10a.

In addition, the Court of Appeals proceeded to clear up two other points "to avoid error on retrial." Pet. App. 10a. First, it held that the jury instructions on punitive damages were unconstitutionally vague and denied General Motors' right to due process and that the procedures used in arriving at those awards had effectively denied General Motors its right "to trial court and appellate court review of the punitive damages award." *Id.* at 12a.

Second, the Court of Appeals held that the District Court was obliged to give full faith and credit to the Michigan injunction barring Elwell's testimony, and had erred by failing to do so. On this issue, the Court of Appeals noted that even assuming, *arguendo*, that any "public policy" exception exists to the full faith and credit principle as applied to judgments, Pet. App. 14a n.10, any Missouri policy in favor of open-ended discovery and disclosure is outweighed by the countervailing Missouri policy in honoring the overriding dictates of full faith and credit, *id.* at 13a-14a. Moreover, the Court of Appeals held that the controlling command of full faith and credit cannot be evaded merely because an injunction may be subject to modification by the issuing court, particularly where the complaining party has not sought modification from the issuing court and that court has expressly declined to grant such

modification in previous instances. *Id.* at 14a-16a.

## REASONS FOR DENYING THE WRIT

This case does involve an important issue of federal law under the Full Faith and Credit Clause that is of increasing significance to the administration of justice throughout the country. Petitioners also correctly note that there is disagreement on this issue among the lower federal and state courts of last resort. Nonetheless, because this important issue is not squarely presented by the ruling below, because this case was correctly decided, and because the case has been remanded for retrial on several grounds, the issue framed in the petition for certiorari does not merit review at this time.

1. The Court of Appeals correctly decided the issue presented in this case under the Full Faith and Credit Clause. It began from the established principle that the dictate of full faith and credit requires all American courts to honor the binding terms of an injunction entered by a particular state court. Framed in terms of the posture of this case, therefore, the Court of Appeals held that the "constitutional full faith and credit principle requires that federal courts give the same faith and credit to a state court judgment as would the state court in which it was rendered. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996)." Pet. App. 13a.

Proceeding from these correct statements of general principles, the Court of Appeals considered and rejected the two grounds that had been relied on by the District Court in its ruling that refused to give full faith and credit to the Michigan injunction: (i) that a "public policy" exception to full faith and credit under Missouri law in favor of full disclosure of information in the discovery process allowed Elwell to testify in disregard of the terms of the Michigan injunction; and (ii) that because the terms of the Michigan injunction are

subject to modification by the issuing court in certain limited circumstances, they are likewise open to modification by any other court on any basis as it may see fit.

On the first issue, the Court of Appeals proceeded by assuming, *arguendo*, that “a public policy exception to the full faith and credit command exists” with respect to judgments. In fact, that premise is incorrect, and the court registered its “acknowledge[ment of] the contrary authority cited by [General Motors] on this issue. See, e.g., *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Restatement (Second) of Conflict of Laws* § 117 (1971) (sister state judgment recognized in other state regardless of the fact that bringing the original action in the recognizing state would offend that state’s public policy).” Pet. App. 14a n.10. Indeed, those contrary authorities are dispositive of this issue; in *Howlett*, this Court expressly reiterated that the “full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, *although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy.*” 496 U.S. at 382 n.26 (emphasis added); see also *Morris v. Jones*, 329 U.S. 545, 550-551 (1947). Indeed, this controlling principle can be traced back at least as far as the Court’s decision in *Fauntleroy v. Lum*, 210 U.S. 230 (1908). This longstanding rule is subject only to two minor exceptions, neither relevant here: full faith and credit principles do not apply to: (i) judgments based on penal laws, see *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); or (ii) judgments involving the disposition of land, see *Olmsted v. Olmsted*, 216 U.S. 386 (1910).

Some confusion has arisen on this point from time to time because this Court has recognized a “public policy” exception to application of another State’s *statutory law* as a matter of determining the appropriate choice-of-law rules to govern the claims raised in individual cases. That situation, however, has been clearly distinguished from the situation involving

enforcement of *final judicial orders*, which are and must be binding throughout the nation. See, e.g., *Titus v. Wallick*, 306 U.S. 282, 291 (1939); see also *Nevada v. Hall*, 440 U.S. 410 (1979). It has been recognized that the binding nature of final judicial orders is essential if the Full Faith and Credit Clause is to fulfill the purpose designated by the Framers of the Constitution, which is “to transform the several States from independent sovereignties into a single, unified Nation.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring).

Nonetheless, the Court of Appeals in this case did not rest on this basis because it identified an alternative ground for its decision on this point — that even if any such “public policy” exception *did* exist, it could never dictate that a Missouri court should ignore the dictates of a Michigan injunction because any such alleged “public policy” would be offset or outweighed by the equally fundamental public policy embodied in Missouri law of honoring full faith and credit principles. Pet. App. 13a-14a. Because Missouri law (like the law in every other State, which reflects controlling federal statutory and constitutional law) “embraces the theory of full faith and credit,” it is “difficult to see how Missouri’s public policy is any less supportive of full faith and credit than it is of full and fair discovery” or any other supposed public policy that could be alleged to conflict with it. *Id.* at 14a. Thus, it was error for the District Court to override the command of full faith and credit in favor of the alleged public policy favoring full discovery or any similar public policy. *Id.* Although the Court of Appeals thus reached this conclusion by a somewhat different route than was urged by General Motors — one that relied in part on its assessment of the public policies embodied in Missouri law — its analysis certainly led it to the correct result, as a matter of controlling federal law, both in this case and in any similar case.

On the second issue, concerning whether the Michigan

injunction is subject to modification, the Court of Appeals explained that "the mere fact that an injunction remains subject to modification in one state does not render it unworthy of full faith and credit in another," for "the full faith and credit clause 'is not so weak that it can be evaded by mere mention' of the word 'modification.'" Pet. App. 15a (quoting *Howlett*, 496 U.S. at 383). Instead, the Court of Appeals made three points that, taken as a whole, were found to be dispositive.

First, the plaintiffs have the undoubted right and could avail themselves of the opportunity to seek a modification of the Michigan injunction from the issuing court, but they have never bothered to do so. Indeed, this point completely defeats the due process arguments raised in the petition for certiorari. See Pet. 12-18. In this case, in particular, not only have petitioners not been deprived of their day in court on their tort claims, which they will have when this case is remanded for a new trial, but also they have not been deprived of their day in court in seeking to set aside the binding effects of the Michigan injunction, which they may pursue by raising the point in the issuing court. It simply does not violate due process for courts in other jurisdictions to honor full faith and credit principles and thus prevent the plaintiffs from making a deliberate end-run around the legitimate and co-equal authority of the Michigan court.

Second, although Michigan law authorizes the issuing court (but no other court, even another court in Michigan) to modify an injunction based on a true change in circumstances, the District Court had conceded that no such change in circumstances had obtained between General Motors and Elwell in this case. Pet. App. 15a.

Third, the Court of Appeals noted that the issuing court itself so far has declined requests made by several parties to vacate the injunction or modify its terms after giving full consideration to the issues raised by petitioners here. *Id.* at

15a-16a. Indeed, at this juncture the issuing court in Michigan has denied motions by five separate parties — *including by Elwell himself* — to vacate or modify the injunction. In addition, another Michigan court has denied a motion filed by a similar products-liability plaintiff that also sought to undermine the binding effects of this injunction, noting that under Michigan law only the issuing court has the authority to vacate an injunction or modify its terms.

In this situation, there is no tenable basis for holding that a different court in another jurisdiction is at liberty to change or ignore the binding terms of the Michigan injunction, unless the courts are determined to be simply free to deny full faith and credit to such judicial orders. Indeed, this Court expressly disapproved of such an approach in *Matsushita*, declaring that in applying the Full Faith and Credit Clause, federal courts "may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.'" *Matsushita*, 116 S. Ct. at 877 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). Thus, the Court of Appeals correctly held that the Full Faith and Credit Clause requires enforcement of the Michigan injunction in this case. Because the court below got this issue right in its decision reversing and remanding this case for a new trial, plenary review of the issue by this Court is not necessary here.

2. Nonetheless, petitioners accurately aver that the decisions rendered by lower courts of last resort on the enforceability of the Michigan injunction under the Full Faith and Credit Clause are directly in conflict. As just explained, the Eighth Circuit has held in this case that the constitutional command of full faith and credit must be followed in this specific context.<sup>2</sup>

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<sup>2</sup> In a similar vein, the Ohio Supreme Court has held that such an injunction is proper to bar a former employee from testifying against

Petitioners have noted, however, that two other courts of last resort have reached the opposite conclusion by refusing to give binding effect to the very same Michigan injunction at issue in this case. In *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ken. 1995), the Kentucky Supreme Court decided that a lower state court could modify the otherwise binding terms of the Michigan injunction in order to give the plaintiffs access to Elwell's testimony on facts that were not protected by any legal privilege. At the request of the plaintiffs in a products liability case brought in the United States District Court for the Eastern District of Kentucky, the Kentucky Supreme Court broadly declared that "neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction." *Id.* at 402. Instead, the Kentucky Supreme Court concluded that because the terms of the Michigan injunction would be subject to modification upon reconsideration by the issuing court, they could therefore be susceptible of modification by *any* court in *any* other jurisdiction upon *any* conceivable grounds as it saw fit. *Id.* at 400-01. Because almost every injunctive order is subject to subsequent modification by the issuing court in appropriate circumstances, this holding would completely undercut the core principles of full faith and credit. Rather than leaving this determination to the issuing court, as is required under Michigan law, the Kentucky Supreme Court ruled that every court can freely redetermine the supposedly binding terms of the Michigan court's order, which gives the terms of that order no controlling force whatsoever, but would allow them to be enforced selectively and inconsistently by different courts in different jurisdictions.

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his former employer because his testimony would be tainted by his long access to privileged attorney-client information during his previous legal work for the former employer, and that such an injunction can properly be enforced outside of the trial court's jurisdiction. *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 121 (Ohio 1991).

Likewise, petitioners have noted that in *Smith v. Superior Ct.*, 49 Cal. Rptr. 2d 20 (Ct. App.), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996), the California courts similarly declined to give binding force to the terms of the Michigan injunction.<sup>3</sup> Again applying the nonexistent "public policy" exception to judgments, the California court complained that the Michigan injunction "violates our fundamental public policy against suppression of evidence" and thus erroneously concluded that to honor and enforce the terms of that injunction would "undermine the fundamental integrity of this state's judicial system." *Id.* at 27. This ruling, too, simply cannot be squared with the Eighth Circuit's contrary decision in this case.

It is also indisputable that the narrow issue of what binding force to give to the Michigan injunction at issue in this case has created broad disagreement among the lower trial courts in both the federal and state systems. Because the issue is not subject to immediate review on appeal unless certified by the trial court, or unless review is had by the narrow avenue of mandamus, the consequences of this disagreement for litigating parties are even greater than might otherwise be apparent from considering only those decisions rendered by lower courts of last resort.

3. Although it would appear that the general issue of whether injunctions are entitled to full faith and credit has been long settled, petitioners point to the *Restatement (Second) of Conflict of Laws* to assert that this Court "has not had occasion to determine whether full faith and credit requires a State of the

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<sup>3</sup> Because the California Supreme Court denied review in *Smith*, it too must be regarded as a decision of a state court of last resort for purposes of determining this Court's certiorari jurisdiction. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 628-29 (1988) (certiorari granted in case from California Court of Appeals where the California Supreme Court had denied discretionary review).

United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act." *Id.* § 102, comment c.<sup>4</sup> And, indeed, a few state courts have held that certain very limited classes of injunctions are not entitled to be given full faith and credit by courts in other jurisdictions. See *Fuhrman v. United Am. Insurors*, 269 N.W.2d 842 (Minn. 1978); *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858 (Ill.), *cert. denied*, 358 U.S. 915 (1958).

Other courts, however, have properly given full faith and credit to injunctions ordered by state courts. See, e.g., *Gouveia v. Tazbir*, 37 F.3d 295, 300-01 (7th Cir. 1994) (applying full faith and credit to "a valid, permanent injunction from an Indiana state court"); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 712-14 (9th Cir. 1992) (full faith and credit requires state court decision denying injunction and ordering compulsory arbitration to be enforced by a federal court); *Young v. McDaniel*, 664 F. Supp. 263, 265 (W.D. Ky. 1986), *aff'd*, 826 F.2d 1066 (6th Cir. 1987). And earlier this year this Court clarified one of the points raised by petitioners here, squarely holding that a state court settlement judgment was entitled to be given full faith and credit by all other courts. See *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 878 (1996).<sup>5</sup>

<sup>4</sup> But see *id.* § 117 ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its own courts on the original claim.").

<sup>5</sup> Petitioners' purportedly dire references to the "purchase[d] silence" of Elwell, see Pet. 11 & 16, are thus inappropriate in the wake of the Court's square holding in *Matsushita* that full faith and credit is to be afforded to settlement judgments. They also are particularly inappropriate in the circumstances here, where the Michigan court, based on the factual findings made after an evidentiary hearing on the matter, determined that Elwell had

4. Recent developments have suggested that this issue of full faith and credit is one of growing importance to the administration of justice throughout the country. Over the past year, an ongoing legal battle of great significance has been waged between the state courts of Kentucky and Mississippi about whether Jeffrey Wigand, a former vice-president for research and development at Brown & Williamson Tobacco Corporation, can be allowed to testify in Mississippi state court in defiance of a restraining order issued previously by a Kentucky state court. The Kentucky case is a civil suit alleging that the ex-employee lied about stealing confidential documents, misappropriated trade secrets, and breached his contract with his former employer by offering himself as an expert witness in litigation against tobacco companies. After the Mississippi court had authorized attorneys to proceed with his deposition, which did take place, the opposing attorneys then returned to the Kentucky courts to seek a contempt citation against him. See, e.g., Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., Jan. 26, 1996, at A1; Robb Mandelbaum et al., *Whistle-Blowers; Brown & Williamson v. Wygand*, AM. LAW., Mar. 1996, at 115; Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1. The legal issues raised by the continuing standoff between those dueling jurisdictions are the same kinds of issues that are involved in this case.

At the same time, the general issue of full faith and credit as applied to the enforceability across state lines of injunctive rulings continues to trouble the lower courts in the important areas of child custody determinations and child support enforcement. See, e.g., Emily Barker, *Delivering "Baby*

wrongfully disclosed General Motors' privileged attorney-client and work-product information and therefore granted injunctive relief against any such further misconduct before the case was later settled. See pages 4-5, *supra*.

*Jessica" to Her Biological Parents*, AM. LAW., Oct. 1993, at 32. The difficulty that courts have had in these areas continues to generate congressional scrutiny and piecemeal action. See, e.g., Marianne Lavelle & Marcia Coyle, *Child Support*, NAT'L L.J., Aug. 16, 1993, at 17 (discussing status of the proposed Full Faith and Credit for Child Support Orders Act); see also Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A (modifying effects of general full faith and credit statute, 28 U.S.C. § 1738, in this context). Determination of the questions raised by the enforceability of the Michigan injunction at issue in this case under the Full Faith and Credit Clause would be likely to lend further clarity that is badly needed by the state and federal courts that must continue to wrestle with these issues.

Moreover, in a broader context, the issue of full faith and credit as applied to "the public Acts" and "judicial Proceedings" of each State, and Congress' power to prescribe "the Effect thereof" under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, is now being raised with great vigor in the context of same-sex marriages. With the recent enactment by Congress of the Defense of Marriage Act, Pub. L. No. 104-199 (Sept. 21, 1996), which legislates a federal exception to full faith and credit principles in this one specific area, the courts will soon be obliged to consider the validity and effect of that legislation as well as the threshold question of whether any antecedent "public policy" exception to judgments exists under the Full Faith and Credit Clause. See, e.g., Patricia Wen, *Measure Barring Gay Marriages Seen as Vulnerable*, BOSTON GLOBE, Sept. 12, 1996, at B1. Once again, the Court's direct determination of the issues involved in this case would likely shed light on the related issues of full faith and credit that are certain to be raised by the new federal legislation.

5. Nonetheless, the important issue that petitioners have sought to frame in their petition for certiorari -- which is whether a court may properly refuse to give full faith and credit

to an injunction issued by another court, based on a supposed "public policy" exception to the enforcement of judgments -- is not squarely raised in this case. As explained previously, the Court of Appeals resolved this case without directly addressing this issue. Instead, it assumed, *arguendo*, that even if any such "public policy" exception exists to the full faith and credit principle as applied to judgments, the alleged Missouri policy in favor of open-ended discovery and disclosure is outweighed by the countervailing Missouri policy in honoring the overriding dictates of full faith and credit. Pet. App. 13a-14a & n.10. Although General Motors continues strongly to maintain the view that no such "public policy" exception does or should exist to the enforcement of judgments under the Full Faith and Credit Clause, see, e.g., *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Fauntleroy v. Lum*, 210 U.S. 230 (1908), the Court of Appeals' more limited ruling, which it premised instead on the basis of what it judged to be the nature and significance of the public policies embodied in Missouri state law, is not worthy of plenary review by this Court. In the end, therefore, the more significant full faith and credit issue that surrounds the enforceability of the Michigan injunction involved in this case is simply not implicated by the legal analysis adopted in the decision below.

6. Finally, the full faith and credit issue is presented here in an interlocutory posture. The Court of Appeals has remanded this case for a new trial on a variety of grounds, including that the District Court erred by imposing an unjustified sanction; by giving unconstitutional jury instructions on punitive damages; and by allowing Elwell to testify in contravention of the Michigan injunction. The purpose of the new trial in this case will be to present the relevant issues of Missouri tort law to the jury for resolution, freed from the taint of these errors.

In this posture, the results of the proceedings on remand could entirely eliminate any need for this Court to consider and

decide the merits of the issue raised in the petition. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). On the one hand, if General Motors prevails at trial, and petitioners continue to believe that they were prejudiced by the omission of Elwell's testimony, they are free to pursue the issue further at that point, because this Court's prior denial of certiorari does not "establish the law of the case or amount to *res judicata* on the points raised" at a later stage of the same case. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Armed with the more complete perspective of a completed retrial, however, it might be that petitioners would conclude either that this one procedural point was not particularly prejudicial to their case or that it is not worth pursuing in any event. On the other hand, if petitioners were to prevail in the new trial, then it is likely that they would not be able to claim any prejudice resulting from the fact that Elwell did not testify. At the very least, the new trial on remand may well clarify the true importance of this issue, which would avoid any need for this Court to resolve this issue in an interlocutory posture, where its significance to the ultimate resolution of this case rests largely on speculation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 1996